United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2016

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GEORGE BIDERMAN, CHARLES S. LOWRY, MICHAEL FRY, ANNE FRY, W. DAVID ANDERSON, MULES S. FREHM, NORMAN VALE, J. SALKELD RIDER, ALAN HALSTEAD, WARNER DANBY, KATHLEEN ELGIN, FREDERICK TAUSSIG, HELEN ELY, LORRIN C. MAWDSLEY, ROBERT SPENCER, PETER SHEPHERD and EMILY MARKS,

Plaintiffs-Appellants,

against

ROGERS C. B. MORTON, Secretary of Interior, GEORGE B. HARTZOG, JR., Director, National Park Service, CHESTER BAKER, Regional Director of Northeast Region, National Park Service, JERRY WAGERS, Superintendent, New York Group, National Park Service, JAMES W. GODBOLT, Superintendent, Fire Island National Seashore, National Park Service, PETER F. COHALAN, Islip Town Supervisor, CHARLES BARRAUD, Brookhaven Town Supervisor, ARTHUR SILSDORF, Mayor, Village of Ocean Beach, ROBERT S. WRIGHT, Mayor, Village of Saltaire, WILLIAM SCHERMERHORN, Chairman, Islip Board of Appeals, THOMAS ROMEO, Chairman, Brookhaven Board of Appeals, JOHN LUDLOW, Chairman, Saltaire Board of Appeals, BENJAMIN EPSTEIN, Chairman, Ocean Beach Board of Appeals, CARLOS CRUZ, Director of Building Department, Islip, ALBERT CARNES, Director of Building Department, Brookhaven, BRUCE KAHLER, Building Inspector, Saltaire, and EDWARD DATTNER, Building Inspector, Ocean Beach,

Defendants-Appellees,

CONSTITUTIONAL RIGHTS COMMITTEEE OF KISMET,

Intervenor-Appellee-
Cross-Appellant.

Appeal From Interlocutory Order Denying a Preliminary Injunction of The United States District Court for the Eastern District of New York

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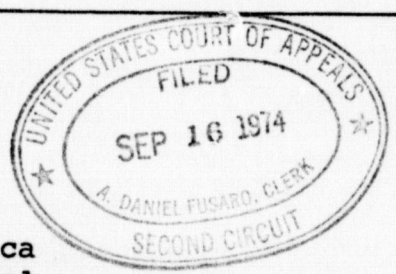
BRIEF OF APPELLEE-CROSS-APPELLANT CONSTITUTIONAL RIGHTS COMMITTEE OF KISMET



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BRIEF OF APPELLEE-CROSS-APPELLANT
CONSTITUTIONAL RIGHTS COMMITTE OF KISMET

ISSUES PRESENTED ON INTERVENOR'S CROSS-APPEAL

1. Do the onerous restric ion upon motor vehicle travel on the Fire Island National Seashore imposed by 36 CFR Section 7.20, deprive Intervenor's members of due process and equal protection by amounting to a confiscation of their property without due process or just compensation, necessitating an injunction, enjoining the Federal defendants from in any way prohibiting driving on Fire Island from the easterly terminus of the Robert Moses Causeway to the privately owned walks of

the unincorporated area of Kismet, Town of Islip, Fire Island, New York, along the inland route described in Intervenor's cross-claim.

2. Was a prescriptive easement through the "Greenberg Strip" in favor of the property owners of Kismet established, as a matter of law, by the testimony upon the hearing below, creating a right in the Kismet property owners to travel over the easement without interference from the Federal defendants, necessitating the issuance of an injunction against the Federal defendants enjoining them from in any way, restricting this right to travel.

3. Does the refusal by the Federal Government to issue permits to property owners of Kismet (Intervenor's members) for the operation of motor vehicles on the Fire Island National Seashore upon grounds not explicitly set forth in 36 CFR Section 7.20 warrant relief in the nature of Mandamus, enjoining and restraining the Federal defendant from denying permits for the operation of motor vehicles on the Fire Island National Seashore upon grounds not set forth in 36 CFR Section 7.20.

ISSUES PRESENTED IN OPPOSITION TO PLAINTIFFS-APPELLANTS' APPEAL

Are the plaintiffs-appellants entitled to a preliminary injunction "enjoining all defendants from approving, issuing, granting or authorizing motor vehicle permits except to provide for essential services for the health and safety of

the residents and visitors of the Fire Island National Seashore and from allowing motor vehicles to be operated on said Seashore except as necessary for essential service for health and safety" until an Environmental Impact Statement has been prepared and implemented.

STATEMENT OF CASE

A. Nature of Case. By this action, plaintiffs sought, inter alia, relief in the nature of Mandamus, requiring the Secretary of the Interior to prepare an Environmental Impact Statement as soon as practicable, and a declaration that the Secretary has the power to effectively ban motor vehicle traffic on the Fire Island National Seashore.

B. Proceedings Below. By notice of motion for preliminary injunction dated August 22, 1973, plaintiff moved before Judge John F. Dooling, Jr.*for a preliminary injunction to halt further development of the Fire Island National Seashore, and to enjoin the use of motor vehicles thereon, except that necessary for public health, safety and welfare.

Intervenor, Constitutional Rights Committee of Kismet, comprised of approximately fifty members, residents of the unincorporated area of Kismet, was granted leave to intervene as a defendant and opposed so much of plaintiff's motion seeking to enjoin the use of motor vehicles by Intervenor's members. In its cross-claim against the Federal defendants, Intervenor sought a declaration that its members have a constitutional right to ingress and egress to and from their homes by motor vehicles along

*United States District Judge for the Eastern District of New York.

a mostly paved, inland route running between Kismet and Robert Moses Causeway, and that any interference therewith by the Federal defendant is unreasonable and amounts to an unconstitutional deprivation of property rights. Injunctive relief predicated thereon was also sought.

Following a denial of plaintiffs' original motion for a preliminary injunction, except for branch (f) regarding motor vehicles as to which decision was held in abeyance, and the affirmance of that denial by this Court, plaintiffs renewed branch (f), seeking to enjoin the issuance of permits for the operation of motor vehicles on the Fire Island National Seashore. Thereupon, Intervenor cross-moved to enjoin the Federal defendants from, in any way, prohibiting driving on Fire Island along the inland route between Kismet and the Robert Moses Causeway. During the hearing thereon before Judge Dooling, Intervenor moved further to enjoin the Federal defendants from predicating the denial of motor vehicle permits upon grounds not explicitly set forth in 36 CFR Section 7.20 (the regulation governing the issuance of motor vehicle permits). (Appendix 1)

C. Determination of Court Below. All motions were denied by Judge Dooling's memorandum and order dated July 19, 1974,* and all appeals are from said Order.

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* This memorandum and order is annexed to Appellants' Brief as Appendix A and is referred to herein as P. App. A - Plaintiff's Appendix A.

With respect to Intervenor's motion to enjoin the Federal defendants from interferring with driving along the inland route between Robert Moses Causeway and the private walks of the Lighthouse Shores area of Kismet, Judge Dooling grounded his denial upon the determination that:

(i) Once a vehicle is admitted from Robert Moses Causeway to Kismet, there is no way of restricting its further movement to Sea Bay Beach,* Saltaire, Ocean Beach, and other communities to the east. (P. App. A, p.19).

(ii) Kismet cannot be treated in a different fashion from the other communities to the east (P. App. A, p.19).

(iii) Kismet residents have no prescriptive right to cross the "Greenberg Strip" by automobile since the Greenbergs had occassionally barricaded their property, and repeated trespasses, not acquiesced in but not prosecuted, could not amount to establishing a prescriptive easement (P. App. A, p.19).

With respect to the denial of Intervenor's motion to enjoin the Federal defendants from refusing to issue motor vehicle permits upon grounds not explicitly set forth in 36 CFR Section 7.20, including a mainland residence of the applicant and the existence of limited private ferry service, Judge Dooling held:

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* Parenthetically, Sea Bay Beach is, in fact, part of the unincorporated area of Kismet, represented by Intervenor.

"The Kismet Committee particularly points out that the National Park Service apparently denies permits on the allegedly inadquate ground that the applicant seeking a permit because of the alleged inadequacy of the ferry service had a mainland residence at which he could spend the night on those occasions when he missed the last ferry (Exhibit C). But the position taken by the National Park Service is reasonable [5].* It is enough to say that such is the very nature of Fire Island vacation residence; it is not unique in that regard among vacation lands. No unavoidable hardship in involved". (P. App. A, pp. 19-20).

FACTS**

Intervenor does not quarrel with so much of plaintiffs' treatment of the testimony below as reflects the deleterious impact of driving upon the beach and dunes of Fire Island. However, the unchallenged testimony adduced below established that the use of motor vehicles along the inland route which connects the privately owned walks of

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*Footnote 5 made reference to Section 61-2H of the Code of the Town of Islip, requiring permit applicants to swear to sole 12-month residency on Fire Island. That ordinance has been declared unconstitutional as applied to certain Kismet residents by Mr. Justice DiPaola of the Supreme Court of the State of New York, County of Suffolk in Lighthouse Shores v. Town of Islip, not reported.

** Because this appeal is being heard upon typewritten briefs, without Appendices, by Order of the Court made on August 12 , 1974, we are attaching for the Court's convenience, copies of 36 CFR Section 7.20, and certain of the exhibits below.

Kismet, the western most community on Fire Island, with the Robert Moses Causeway (Plaintiff's Exhibit 1), which route is situated approximately 400 feet north of the dune line, and which is macadam for all save a 435 foot portion, (Intervenor's Exhibit G)* constitutes no ecological hazard to Fire Island. Thus, both Dr. Donald Coates, called by plaintiffs to establish the deleterious effect of vehicular traffic upon the dunes and beach of Fire Island, and Dr. Manfred Wolff, both experts in geomorphology, testified that no adverse ecological impact could be attributed to regular motor vehicle use of the inland roadway running between Robert Moses Causeway and the walks of Kismet. (Coates, Tr pp. 278 and 287; Wolff, Tr pp. 648-649).**

The testimony compellingly demonstrated the unjustifiable hardship imposed upon Kismet property owners by the deprivation of their right to drive to and from their homes. Kismet has no doctors, dentists, theatres, or pharmacy. (Tr pp. 548 - 557). It has but a single grocery store, with

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* The transcript of the testimony given by William Delaney Executive Secretary of the Long Island State Park Commission in the matter of Lighthouse Shores v. Town of Islip, establishes that the Long Island State Park Commission twice paved the inland roadway between 1964 and 1972.

** "Tr" refers to the Transcript of the hearing before Judge Dooling.

prices far higher than those upon the mainland. (Tr. pp. 553 and 545) Ferry service is provided during very limited hours in the summer months, and, between October and March of each year there is no ferry service to Kismet whatever. (Appendix 2) Persons with jobs on the mainland whose work hours start at 8 a.m. or earlier cannot reach their places of employment via the existing summer ferry schedule. (Tr pp. 755-6 and 758) Persons wishing to go upon the mainland for whatever recreational, medical, or compelling business reason must return no later than 10 P.M. on each week night, and 11:15 P.M. on the weekend, when the ferry service is available (Appendix 2 and Tr p.558) There are no public parking facilities for motor vehicles in Bay Shore where the mainland ferry dock is situated (Tr p.550). Private parking facilities cost in excess of $60.00 per month, (Tr pp. 757 and 551) and at that, no guarantee of parking is afforded. (Tr p. 757) Persons wishing to purchase groceries on the mainland must pay a ferry freight charge for each parcel (Appendix 2).

Any argument that driving on and off the island may be allowed by the National Park Service, in emergency situations, is totally negated when one considers the testimony of Ranger Ott that in order to drive on or off the beach with a so-called "limited term" permit, one must maintain on Fire Island, on a year round basis, a four-wheel drive vehicle costing between $3,000.00 and $7,000.00. (Tr pp. 635-636) Plainly, persons who

cannot make regular use of such four-wheel drive vehicles will not be induced to purchase such vehicles only to keep them parked or garaged, idly.

The evidence below also establishes the existence of a prescriptive easement by reason of continuous adverse use by Kismet residents, over the so-called "Greenberg Strip", a 435 foot wide strip from bay to ocean owned, since 1966, by the Fire Island National Seashore and located immediately west of the Lighthouse Shores area of Kismet.

The uncontradicted testimony below of Mrs. Jean Wood, a witness called by plaintiffs, as well as Henry R. Kaven and Robert Hodges, established that, since 1947 and to and including the present, motor vehicles owned or operated by persons living in Lighthouse Shores, and other portions of Kismet, have regularly traveled in both directions along the unpaved extension of the inland roadway through the "Greenberg Strip". Robert Hodges, who, from 1947 to 1958, was in the United States Coast Guard Service stationed at the lighthouse, and since 1958, a resident of Lighthouse Shores, testified that from 1947 on, he observed daily the passage of automobiles and trucks across the "Greenberg Strip" under the operation or ownership of persons he knew to reside within Lighthouse Shores or Kismet. (Tr pp. 720-725) He testified further that, between 1947 and 1972, he was among those who regularly operated a motor vehicle along the unpaved extension of the inland roadway through the "Greenberg Strip". (Tr p.724)

Mr. Kaven, who has lived or rented in Kismet for approximately 25 years (Tr pp. 738-739), testified that he too has regularly traversed the unpaved portion of the inland roadway through the "Greenberg"property for the entire period, and has seen others, known to be residents of Lighthouse Shores, Kismet, and elsewhere, do likewise. (Tr pp. 740-743)

Even Mrs. Wood, who was not Intervenor's witness and who has spent approximately seventeen summers in Lighthouse Shores, testified that she has observed Mr. Hodges, as well as the developer of Lighthouse Shores and others, travelling in both directions along the unpaved extension of the inland roadway across the Greenberg property. (Tr pp. 542-543)

Against this immutable array of evidence of continuous, open and hostile adverse use of the Greenberg property between 1947 and 1966, when the government acquired that parcel, there was but sketchy testimony from a witness that on one occasion, or possibly two, Mrs. Greenberg had endeavored to erect a fence across her property, which was promptly driven over. (Tr p. 537)

Beyond that, the evidence also demonstrated that employees of the National Park Service, with the concurrence of their superiors, are presently denying motor vehicle permits to Kismet residents otherwise qualified therefor upon unauthorized grounds, grounds not set forth in 36 CFR 7.20, the validity promulgated regulation governing the issuance of permits. The evidence showed that the National Park Service utilized such criteria as "alternate

access by ferry", referring to the limited private ferry service between Bay Shore on the mainland and Kismet (Appendix 2) and the fact that an applicant has residence on the mainland, as grounds for denying motor vehicle permits (Appendix 3)*

Thus documented is the National Park Services's actual denial of motor vehicle permits predicated upon what it deems to be the existence of "adequate" ferry service between Kismet and Bay Shore and the existence of a mainland residence.

Although Jerome Wagers, Regional Director of the National Park Service for the Northeast Region testified that denial of permit applications upon the ground of alternate access by ferry is reflective of the authorized policy of his office, at the same time he claimed that denial of a motor vehicle permit could not be based on the residence of the applicant (Tr p.508). But in fact, the National Park Service's actual denial of permits predicated upon what it deems to be the existence of "adequate" ferry service as well as a mainland residence is documented (Appendix 3). Wagers further testified that the assistance of vehicles is necessary to sustain life on Fire Island (Tr p.500) and that the needs of Fire Island residents are not adequately met by the private ferry service (Tr p.502).

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* Appendix 3 was Intervenor's Exhibits C and F at the hearing below.

ARGUMENT

P O I N T I

THE ONEROUS RESTRICTIONS UPON MOTOR VEHICLE TRAVEL ON THE FIRE ISLAND NATIONAL SEASHORE IMPOSED BY 36 CFR SECTION 7.20, DEPRIVE INTERVENOR'S MEMBERS OF DUE PROCESS AND EQUAL PROTECTION OF THE LAWS, AND ARE UNCONSTITUTIONALLY APPLIED TO KISMET

The current regulation governing the issuance of permits for the operation of motor vehicles on the Fire Island National Seashore contained in 36 CFR Section 7.20, (Appendix 1) imposes onerous and oppressive restrictions upon motor vehicle use on Fire Island. Among other things, the regulation bars motor vehicle use:

a) From May 15 through September 14, between 9 A.M. and 6 P.M. of each day, and continuously from 9 A.M. Saturday through 6 P.M. Sunday, of each weekend.

b) From September 15 to November 10, between 9 A.M. and 6 P.M. of each weekend.

c) Only vehicles able to traverse sand are permitted.

d) Only applicants who have first secured a Town of Islip or Brookhaven permit covering the same vehicular use may be permitted.*

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* Intervenor's Exhibit H, a March 19, 1974 letter from the Town of Islip to Barbara Busch, establishes that Islip has conceded that it lacks jurisdiction to issue permits to persons residing in Lighthouse Shores for travel along the inland route between the walks of Lighthouse Shores and the Robert Moses Causeway as a result of the decision of Mr. Justice DiPaola in Lighthouse Shores v. Town of Islip. Accordingly, Islip will not issue permits to persons so situated.

These restrictions so curtail the use to which the Intervenor's members may put their property, so limits its value, and so circumscribes their ability to travel to their jobs, or attend to routine family needs that it amounts to a virtual confiscation of property rights without due process or just compensation.

In view of the unchallenged testimony adduced upon the hearing below that the use of motor vehicles along the inland route between the Robert Moses Causeway and the walks of Lighthouse Shores constitutes no ecological hazard to Fire Island, the restrictions so imposed by 36 CFR Section 7.20 do not withstand constitutional scrutiny.

In People v. Hawkins, 157 N.Y. 1, the New York State Court of Appeals succinctly set forth the principles against which a statutory enactment must be measured in terms of constitutionality:

> "The citizen cannot be deprived of his property without due process of law. The principle embodied in this constitutional guaranty is not limited to the physical taking of property. Any law which annihilates its value, restricts its use, or takes away any of its essential attributes, comes within the purview of this limitation upon legislative power. The validity of all such laws is to be tested by the purpose of their enactment and the practical effect and operation that they may have upon property. A law which interferes with property by depriving the owner of the profitable and free use of it, or hampers him in the application of it for the purposes of trade or commerce, or imposes conditions upon the right to hold or sell it,

> may seriously impair its value, against which the Constitution is a protection. The fact that the legislation hostile to the rights of property assumes the guise of a health law or a labor law will not save it from judicial scrutiny, since the courts cannot permit that to be done by indirection which cannot be done directly." at pp. 7-8 (emphasis added).

The testimony below has clearly demonstrated the many restrictions placed on the use of Intervenor's members' property.

Defiance Milk Products Co. v. DuMond, 309 N.Y. 537, states the type of proof which must be shown to support a legislative exercise of the police powers against the Due Process Clause of the Constitution:

> "The applicable rules of law are well known. Every legislative enactment carries a strong presumption of constitutionality including a rebuttable presumption of the existence of necessary factual support for its provisions [Borden's Co. v. Baldwin, 293 U.S. 194, 209, 210]. . . . But, for all that, due process demands that a law be not unreasonable or arbitrary and that it be reasonably related and applied to some actual and manifest evil [Matter of Jacobs, 98 N.Y. 98, 110; Fisher Co. v. Woods, 187 N.Y. 90; Nebbia v. New York, 291 U.S. 502]. And even though a police power enactment may have been or may have seemed to be valid when made, later events or later-discovered facts may show it to be arbitrary and confiscatory [Abie State Bank v. Bryan, 282 U.S. 765, 772]. at pp. 540-541. (Emphasis added).

By restricting the Intervenor's members means of ingress and egress to their property a confiscation of their property has occurred.

Measured against the standards adverted to above, it is clear that the restrictions imposed by 36 CFR Section 7.20 cannot withstand constitutional analysis insofar as the residents of Kismet are concerned.

Furthermore, in singling out residents residing within the Fire Island National Seashore as a class of persons upon whom the regulation imposes a broad prohibition against use of motor vehicles and placing the residents of Kismet, who have access along an inland route (not touching a dune or the beach) within such classification, 36 CFR Section 7.20 does not satisfy the constitutional criteria for a reasonable classification. The broad constitutional test for a classification set out in McGowan v. Maryland, 366 U.S. 420, that ". . .a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." is not satisfied by the testimony below nor was ". . .any state of facts rationally justifying it [the classification] demonstrated to or perceived by the court" from the testimony below. (See United States v. Maryland Savings-Share Ins. Corp., 400 U.S. 4.)

It is submitted that the avowed purposes of the enactments herein, i.e. to protect the environment, is not a sufficient justification or rational reason to deny to Intervenor's members their constitutional rights to property and to travel freely to and from their property,especially in view of the unchallenged testimony that the use of motor vehicles by residents of Kismet upon the inland road between Robert Moses Causeway and the walks

of Lighthouse Shores constitutes no ecological hazard whatsoever.

Judge Dooling's rationale that "Once a vehicle is admitted from Robert Moses Causeway to Kismet, there is no way of restraining its further movement" and therefore, in view of limited police resources, access to Kismet via the inland route must be cut off in order to ban driving by others to other communities (P. App. A, p.19) is simply not a rationale which satisfies the test of reasonable classification. The courts have frequently held that administrative convenience alone is not sufficient reason to allow discrimination against a class of people. (See Shapiro v. Thompson, 394 U.S.618; Dunn v. Blumstein, 405 U.S.330, and Vlandis v. Kline, 412 U.S. 441.)

Kismet is unique among all the communities of Fire Island in that Kismet alone may be reached by motor vehicle along a mostly paved, inland route, without the necessity of passing through any other communities, onto the beach or through any dune. It is submitted that Intervenor's members must be treated differently from other areas on Fire Island because of access by the inland route. Further, the test of a reasonable classification which must be applied to them is that where Intervenor's members are exercising a constitutional right to own property and to travel freely to and from that property, ". . . any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional. Cf. Skinner v. Oklahoma, 316 U.S. 535, 541,62 S. Ct. 1110

1113, 86 L.Ed. 1655 (1942) Korematsu v. United States, 323 U.S. 214, 216, 65 S.Ct. 193, 194, 89 L.Ed. 194 (1944); Bates v. Little Rock, 361 U.S. 516, 524, 80 S.Ct. 412,417, 4 L.Ed. 2d 480 (1960); Sherbert v. Verner, 374 U.S. 398, 406, 83 S.Ct. 1790, 1795,10 L.Ed.2d 965 (1963)." Shapiro v. Thompson, 394 U.S. 618, 634. (emphasis in original)

Measured by this standard, the governmental interest to be protected is clearly not sufficient to deny Intervenor's members their constitutional right and it is unreasonable and manifestly unjust to snare the residents of Kismet in a net which has been laid for the purpose of preventing others from driving on the beach to the east of Kismet.* This is particularly so when, as demonstrated here, the effect of such a ban is to impose an onerous and unjustifiable restriction upon the Kismet residents' lawful use of their property. The crushing personal burden imposed by the existing regulation and the far more onerous ones evidently contemplated by the Federal defendants (Plaintiffs' Ex. 30) are simply not justifiable in terms of any compelling governmental interest.

We respectfully submit that Judge Dooling fell into error in failing to recognize the unique circumstances of Kismet and failing to declare 36 CFR Section 7.20 to be unconstitutional in its application to Intervenor's members.

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* In fact, the Incorporated Village of Saltaire, located to the east of Kismet, prohibits all driving within its limits. Thus, as a practical matter, no motorist could lawfully drive further east than Kismet in all events.

P O I N T II

A PRESCRIPTIVE EASEMENT THROUGH THE "GREENBERG STRIP", IN FAVOR OF RESIDENTS OF KISMET, WAS AS A MATTER OF LAW, ESTABLISHED BY THE TESTIMONY UPON THE HEARING BELOW

The law of New York State clearly compels recognition of a prescriptive easement upon establishment of open, notorious, and hostile adverse use of the Greenberg property between 1947 and 1966. Proof of such adverse use places the burden upon the United States, as grantee of the Greenberg property, to negate the proof of prescriptive easement by clearly showing that such use was either permissive, or was affirmatively prevented.

Thus, in the case of Hey v. Collman, 78 App. Div. 584, affd. 180 N.Y. 560, the Appellate Court observed (at 586):

> "[T]he continuous, open and exclusive user for all purposes of access for the period in question, as of right and not by virtue of license, would seem sufficient, in the absence of objection or assertion of dominion, to establish the presumption that the user was adverse. Such use was the open and constant claim, and, in the absence of opposition or objection, the plaintiffs were not called upon to manifest any further evidence that their claim was adverse. (Hammond v. Zehner, 21 N.Y. 118, 121 . . .) . . .
>
> "We suppose it to be entirely settled as the law of this State that not only does the conclusive presumption of grant arise from the fact of open, notorious, uninterrupted, undisputed and adverse user of such an easement, but that every user...is presumed to have been under claim of title and adverse, and that the burden is upon the party alleging that the user has been by virtue of a license or permission to prove that fact by affirmative evidence.'"

More recent expressions of the long-established New York rule are to be found. Thus, in Lawrence v. Mullen, 40 A.D. 2d 871 (Second Dept. 1972), the Court observed:

> "The uncontradicted evidence at the trial established that in 1941 appellant's father built a garage on the property she now owns; that he drove his automobile from the garage to the street and back daily until his death in 1960....We find that the use of the right of way was open, notorious, uninterrupted and undisputed and that it was therefore presumed to be adverse and under claim of right, thus casting the burden on respondents, as owners of the servient tenement, to show that the user was by license (cf. DiLeo v. Pecksto Holding Corp., 304 N.Y. 505, 512). They made no such showing and appellant is consequently entitled to judgment declaring that she has an easement of right of way over respondents' property for the passage of an automobile..."

Similarly, in Jansen v. Sawling, 37 A.D. 2d 635 (Third Dept. 1971), the Court held:

> "An easement by prescription may be acquired by using land of another adversely to his rights when the use is continuous, open, notorious and uninterrupted. (DiLeo v. Pecksto Holding Corp., 304 N.Y. 505, 512). The use must exist for 15 years."*

To the same effect, see Hammond v. Zehner, 21 N.Y. 118, and Moore v. Day, 199 App. Div. 76, affd. 235 N.Y. 554.

It follows under the rule of the cases adverted to above, that a prescriptive easement has been acquired in favor of residents of Kismet to traverse the unpaved portion of the

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* The Court in Jansen v. Sawling, supra, was referring to the fifteen year statute of limitations obtaining in former Civ. Prac. Act Sections 34-37. Under CPLR 212, the period has been shortened to ten years, except that the longer fifteen year period prescribed under the Civ. Prac. Act will govern all actions accruing prior to the effective date of the CPLR, i.e., September 1, 1963. See CPLR 218 (b).

inland roadway which runs through the "Greenberg strip", by virtue of the continuous, uninterrupted, open, and hostile adverse use from 1947 to date. Upon proof of such adverse use, the burden shifted to the government, as grantee of the "Greenberg strip", to show that such use was either permissive or was affirmatively interfered with by its grantor. On this score, the sketchy testimony concerning Mrs. Greenberg's isolated effort to erect a fence at one time or another during the nineteen year period between 1947 and 1966, is insufficient to meet such burden. Perforce, an easement has been established and ought to have been recognized by the Court below.

Once having been established, the testimony shows that the government has not paid, or offered to pay, Intervenor's members for the deprivation of their easement of ingress and egress across the "Greenberg strip" accomplished by 36 CFR Section 7.20. The law of New York is clear that the extinguishment by the sovereign of an easement of way is a compensable one requiring condemnation.Thus, in Brown v. State of New York, 36 A.D. 2d 1015 (Fourth Dept. 1971), the Court stated at page 1016:

> "Although the State might permit claimant to continue using this right-of-way, claimant could have no assurance thereof and the extinguishment of claimant's right is compensable (Wolfe v. State of New York, 22 N.Y. 2nd 292, see 4 Nichols, Emminent Domain [ed ed.], Section 14.1)."

It can scarcely be argued here that the deprivation by the Federal defendants, of Intervenor's members' right-of-way across the "Greenberg strip", does not seriously diminish the value of their property. Yet, as Mr. Hodges' testimony clearly

shows, the government has never paid, nor offered to pay, any of the residents of Kismet for the extinguishment of their easement.

It is submitted that, absent a lawful condemnation by the Federal defendants and appropriate compensation therefor, the deprivation of the easement of way by mere promulgation of regulations, restricting or preventing its use, amounts to an unconstitutional taking of the property of the residents of Kismet. It follows, it is submitted, that insofar as 36 CFR Section 7.20 purports to extinguish such easement, without compensation, it is unconstitutional and void.

We respectfully submit that Judge Dooling committed error in failing to so find.

P O I N T III

INTERVENOR IS ENTITLED TO A PRELIMINARY INJUNCTION IN THE NATURE OF MANDAMUS, ENJOINING AND RESTRAINING THE FEDERAL DEFENDANTS FROM DENYING PERMITS FOR THE OPERATION OF MOTOR VEHICLES ON THE FIRE ISLAND NATIONAL SEASHORE UPON GROUNDS NOT SET FORTH in 36 CFR Section 7.20.

The unchallenged documentary evidence before the Court below established that employees of the National Park Service, with the concurrence of their superiors, have denied permits for the operation of motor vehicles on Fire Island National Seashore to persons residing in Kismet upon the express grounds that the existence of limited private ferry service between Bayshore and Kismet provides satisfactory alternate means of ingress and egress to persons residing there and/or that applicants have a residence on the mainland, without specifying where this residence is located (Appendix 3).

It is manifest that the Federal defendants have exceeded their authority, if any, to restrict issuance of the permits for the operation of motor vehicles on Fire Island National Seashore as set forth in 36 CFR Section 7.20. That regulation, promulgated pursuant to the general administrative authority conferred upon the Secretary of the Interior in 16 U.S.C. Section 459 e-6 (a) and (c), does not support the denial of the motor vehicle permits upon the grounds of a mainland residence or adequate ferry service. (Appendix 3). Indeed, denial of permits to persons otherwise qualifying therefore under 36 CFR Section 7.20

upon the grounds that existing ferry service provides adequate alternate means of ingress and egress to residents of Kismet or that such person has a residence on the mainland, amounts to an unlawful exercise of power without statutory or regulatory mandate.

The establishment of these "guidelines" by the Federal defendants have the effect of creating two classes of residents: (1) those who own property in Kismet and (2) those who own property in Kismet and elsewhere, making no distinction as to where this other property is located except to say "on the mainland". (Appendix 3).

There is no sufficient justification or rational reason for this classification sufficient to deny Intervenor's members their constitutional rights to freely travel to and from their property. (McGowan v. Maryland, 366 U.S. 420; United States v. Maryland Savings-Share Ins. Corp. 400 U.S. 4; Shapiro v. Thompson, 394 U.S. 618; Dunn v. Blumstein, 405 U.S. 330; Vlandis v. Kline, 412 U.S. 441.)

Furthermore, there is no provision in the statute or the regulation to contest a classification imposed by "guidelines" established outside the statute or regulation. The result is to create a presumption of non-qualification for a permit because of "adequate ferry service" or "a mainland residence". Such a presumption is violative of the due process clause for it provides no opportunity for residents to contest the classification. (Vlandis v. Kline, 412 U.S. 441).

Moreover, the United States Supreme Court has held that

> "...even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.[8] The breath of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.[9] " Shelton v. Tucker, 364 U.S. 479, 488. (Footnotes of Court omitted).

It is submitted that the classification imposed herein is wholly unrelated to the avowed objective of the statute and regulation, i.e., to protect the environment.

It is further submitted that there exist means less drastic than those presently used by the Federal defendants to protect the personal liberties of Intervenor's members, and yet protect the environment and accomplish the purpose of the statute and regulation. That means is to allow Intervenor's members to drive along the inland route, which, according to the testimony below presents no ecological hazard.(Coates, Tr pp. 278 and 287; Wolff, Tr pp. 648-649).

The Federal defendants are without power to promulgate or enforce a "guideline" which is more onerous or restrictive than the regulation as set forth in 36 CFR Section 7.20. Thus, as Congress may not authorize a state to violate the equal protection clause, neither can Congress authorize an agency to violate the due process clause. (Shapiro v. Thompson, 394 U.S. 618, 641). Recognition of the Government's inability to create a new regulation under the guise of a "guideline" was also expressly given by the United States attorney who stipulated before the Court that the alleged June 15, 1974 "guideline" was not lawfully

promulgated and had been withdrawn. Moreover, in Papachriston v. City of Jacksonville, 405 U.S. 156, at p.170, the Court stated that:

> "Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.' Thornhill v. Alabama, 310 U.S. 88, 97-98."

It is submitted that the 'guidelines' used to issue permits are invalid and cannot be used as a basis to deny permits to Intervenor's members.

Further, deprivation of permits to operate motor vehicles upon the ground that an applicant has another residence off Fire Island is far from "reasonable" as found by Judge Dooling, but is constitutionally impermissible as a matter of law.

36 CFR Section 7120 (2) (vii) incorporates by reference Section 61-2H of the Islip Town Code which requires an applicant for a permit to swear to a twelve month sole residency on Fire Island. It is submitted that this creates a discriminatory classification of the type invalidated in Shapiro v. Thompson, 394 U.S. 631 and it further creates a presumptive classification of the type invalidated in Vlandis v. Kline, 412 U.S. 441 and

> "' (W)hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" Schneider v. Rusk, 377 U.S. 163, 168, 84 S. Ct. 1187, 1190, 12 L.Ed. 2d 218 (1964); Bolling v. Sharpe, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954)." Shapiro v. Thompson, 394 U.S. 618, 642,

This classification effectively prevents Intervenor's members from travelling to and from their property in Kismet. There is absolutely no rational reason or justification for the classification created by the twelve month sole residency requirement. The protection of the environment of Fire Island does not turn on the question of a person's twelve month sole residency, nor is there any governmental interest (much less a compelling one) promoted by this discrimination and it is patently unconstitutional. (See Shapiro v. Thompson, 394 U.S. 618). Furthermore, as applied to certain of Intervenor's members, this Islip ordinance has been found to be unconstitutional by Justice DiPaolo in Lighthouse Shores v. Islip.

It is submitted that, based on the authorities referred to above, Intervenor is clearly entitled to a preliminary injunction in the nature of mandamus enjoining and restraining the Federal defendants from denying permits for the operation of motor vehicles on Fire Island upon grounds not set forth in 36 CFR Section 7.20.

Moreover, the authorities under 28 U.S.C. Section 1361. clearly establish that mandamus will lie to bar the illegal acts of the government and its agents in derogation of the constitutional rights of Intervenor's members.*

---

*This right to mandamus applies equally to the issues involved in Point I because of the deprivation of constitutional rights claimed therein.

Thus, in Cortright v. Reasor, 325 Supp. 797 (E.D.N.Y. 1971), rev. other grounds, 447 F. 2d 245, cert. den. 405 U.S. 965, Judge Weinstein recognized (at 812):

> "It is equally well established that mandamus may be used to correct abuse of discretion by a federal officer, particularly if the abuse constitutes a violation of constitutional rights. Kauffman v. Secretary of the Air Force, 135 U.S. App. D. C. 1, 415 F. 2d 991, 994 (1969) cer. denied, 396 U.S. 1013, 90 S. Ct. 572, 24 L. Ed. 2d 505 (1970); Smith v. Resor, 406 F. 2d 141, 146-147 (2d Cir. 1969); Ashe v. McNamara, 355 F. 2d 277, 282 (1st Cir. 1965); Murray v. Vaughn, 300 F. Supp. 688, 696-697 (D.R.I. 1969); Jaffe, Judicial Control of Administrative Action, 181-182 (1965); Byse & Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action, 81 Harv. L. Rev. 308, 349-353 (1967)." (emphasis supplied).

Where, as here, the Federal defendants are clearly exceeding the authority, if any, conferred upon them by 36 CFR Section 7.20, and denying permits to persons residing in Kismet upon a ground not expressed in such regulation, mandamus will lie to bar the unauthorized act, or alternatively, to compel the issuance of permits to persons qualifying under the existing regulation. In contrast to plaintiffs' prayer to compel the Federal defendants to exercise a discretionary power, if any, in the manner sought by plaintiffs, Intervenor here seeks only to compel the Federal defendants to perform a clearly mandated and ministerial duty, in conformity with 36 CFR Section 7.20. Lovallo v. Froehlke, 346 F. Supp. 1037, affd. 46 F. 2d 340, cert. den. 411 U.S. 918.

It is submitted that based on all the authorities referred to above Intervenor is entitled to a preliminary injunction in the nature of mandamus and that Judge Dooling erred in refusing to enjoin and restrain the Federal defendants from denying permits upon grounds not set forth in 36 CFR Section 7.20.

POINT IV

PLAINTIFFS-APPELLANTS ARE NOT ENTITLED TO A PRELIMINARY INJUNCTION.

It is clear from the testimony at the hearing below that the Fire Island National Seashore is not being destroyed by motor vehicle traffic. (P. App. A, p.3).

It is also clear from the testimony below that the Intervenor's members are suffering a deprivation of their constitutional rights by enforcement of the present regulation, 36 CFR Section 7.20, and the so-called "guidelines" established by the Federal defendants.

For the reasons given in the preceding points and based upon the authorities cited therein, the Plaintiffs-Appellants are not entitled to a preliminary injunction.

It is submitted that Judge Dooling correctly denied Plaintiffs-Appellants' application therefor.

CONCLUSION

THE ORDER OF THE COURT BELOW SHOULD BE REVERSED INSOFAR AS IT DENIED INTERVENOR'S MOTIONS FOR A PRELIMINARY INJUNCTION, INTERVENOR'S MOTIONS FOR A PRELIMINARY INJUNCTION SHOULD BE GRANTED, AND THE ORDER OF THE COURT BELOW SHOULD BE AFFIRMED INSOFAR AS IT DENIED PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION.

Respectfully submitted,

ENGLISH, CIANCIULLI, REISMAN
& PEIREZ
Attorneys for Intervenor-Appellee-
Cross-Appellant Constitutional
Rights Committee of Kismet

Robert M. Calica
Of Counsel

M. Kathryn Meng
On the Brief

APPENDIX 1

§ 7.20 Fire Island National Seashore.

(a) *Operation of motor vehicles*—(1) *Definitions.* The following terms or phrases, when used in this section, have the meanings hereinafter respectively ascribed to them:

(i) *Seashore lands.* Any lands owned or hereafter acquired by the United States or in which the United States possesses or hereafter acquires a proprietary interest.

(ii) *Motor vehicle.* Any self-propelled land vehicle.

(iii) *Official vehicle.* Any motor vehicle while in use for official business of the U.S. Government, the State of New York, the county of Suffolk and of towns, villages, and communities situated on Fire Island, or while in use for hearse, ambulance, fire or other emergency or disaster purposes.

(iv) *Public utility vehicle.* Any motor vehicle owned or operated by a public utility or a public service company enfranchised or licensed to supply Fire Island residents with electricity, water, telephone, bottled gas, or other public utility service while in use for supplying such services.

(v) *Service vehicle.* Any motor vehicle owned or operated by or on behalf of an individual, partnership, or corporation while in use for furnishing Fire Island residents maintenance or repair services, including, but not limited to, installation or repair of household appliances, plumbing, carpentry, and painting.

(vi) *Building contractor vehicle.* Any motor vehicle owned or operated by or on behalf of an individual, partnership, or corporation while in use for landscaping or construction within the several established communities on Fire Island.

(vii) *Schoolbus.* Any motor vehicle owned or operated by or on behalf of a school district or other public or private entity maintaining elementary or secondary schools, while in use for transporting elementary or secondary school children of Fire Island residents and their teachers to and from school activities.

(viii) *Dune crossing.* An access way over a primary or transverse dune designated and marked as a dune crossing.

(ix) *Superintendent.* The Superintendent of the Fire Island National Seashore or his authorized representative.

(2) *Permits.* No motor vehicles, other than official vehicles and schoolbuses, shall be operated across seashore lands except under permit issued by the Superintendent.

(i) The Superintendent is authorized to establish a system of permits consistent with the requirements of these regulations. Any person, firm, corporation, or partnership may apply to the Superintendent for a permit using a form to be provided for that purpose. Before granting the permit, the Superintendent shall consider whether or not the nature and extent of the intended use is consistent with the purposes of the regulations in this part, which are to protect the seashore lands and interests therein, to protect the health and safety of members of the public using the seashore, and to provide for the recreational use of motor vehicles for activities such as sports fishing and hunting in areas and at times which do not conflict with the conservation of the natural resources of the seashore. On this basis, the Superintendent may approve the application, deny the application or grant the application with appropriate limitations and restrictions.

(ii) Permits may be issued for periods of 1 day to 1 year depending on the reasonable requirements of the applicant.

(iii) No permit shall be issued for any motor vehicle having a manufacturer's rated capacity in excess of 1 ton: *Provided,* That application may be made to the Superintendent for a special trip permit for a vehicle of greater capacity to carry heavier loads for which water transportation is not available or feasible.

(iv) No permit shall be issued for any motor vehicle not equipped, in the judgment of the Superintendent, to travel over sand.

(v) Special permits may be issued to those persons who have satisfied the Superintendent that, by reason of their advanced age or infirmity, they require the use of a motor vehicle.

(vi) Permits shall be carried by the operator of a vehicle on Fire Island at all times and displayed upon request.

(vii) No permit will be issued by the Superintendent for any motor vehicle until the applicant has first secured from the towns of Brookhaven and/or Islip (and if required from the village of Ocean Beach or Saltaire also) an appropriate permit covering the same activity, vehicular use, and area of use for which a seashore permit is requested.

(3) *Authorized and prohibited travel.* (i) Except as otherwise specifically provided in this section, travel on all seashore land by motor vehicles is permitted as follows:

(*a*) From May 15 through September 14, inclusive; daily from 6 p.m. of 1 day through 9 a.m. of the following day but not from 9 a.m. Saturday through 6 p.m. Sunday.

(*b*) From September 15 through November 10, inclusive; daily at any hour, but not from 9 a.m. through 6 p.m. Saturday and Sunday.

(*c*) From November 11 through May 14, inclusive, daily at any hour.

(ii) Travel on seashore land by official vehicles and schoolbuses is permitted at all times.

(iii) Travel on seashore lands by public utility vehicles is permitted upon the issuance of a Special Use Permit, which shall be subject to such times of travel and other terms and conditions respecting the use of seashore lands as the Superintendent may determine necessary for the protection of the seashore and the safety of visitors thereto.

(iv) Travel on seashore lands by service vehicles is permitted between Robert Moses State Park and the westerly boundary of Smith Point County Park, subject to the times of travel provided for in subdivision (i) of this subparagraph, except that such travel between the easterly boundary of Ocean Ridge and the westerly boundary of Smith Point County Park is restricted to providing service to owners and occupants of houses situated therein.

(v) Travel on seashore lands by building contractor's vehicles is permitted between Robert Moses State Park and the westerly boundary of Smith Point County Park, subject to the times of travel provided for in subdivision (i) of this subparagraph, except, that from May 15 through September 14, inclusive, travel is permitted only upon issuance of a limited term permit by the Superintendent.

(vi) Travel on seashore lands by motor vehicles for hire is permitted between Robert Moses State Park and the westerly boundary of Cherry Grove subject to the times of travel provided for in subdivision (i) of this subparagraph. Travel on seashore lands by such vehicles between the westerly boundary of Cherry Grove and the easterly boundary of Ocean Ridge is permitted from May 15 through November 10, inclusive; daily at any hour, but not 9 a.m. to 6 p.m. Saturdays and Sundays, except that, such vehicles may be used by householders between Davis Park and Barrett Beach while traveling to their homes daily at any hour. Use by such vehicles between the easterly boundary of Ocean Ridge and the westerly boundary of Smith Point County Park shall be limited to providing service to persons residing therein in the exercise of their prior existing rights of ingress and egress.

(vii) Travel on seashore lands by all other vehicles is prohibited from May 15 through September 14 inclusive except under prior existing rights of ingress and egress. However, during the period of September 15 through May 14 such vehicles may, for recreational purposes, travel over seashore lands at any time on the beach along the Atlantic Ocean between Smith Point County Park and Long Cove. No such vehicle may travel farther inland from the ocean than the base of the dunes.

(4) *Rules of travel.* (i) So far as practicable, motor vehicles shall be operated only on the beach in established tracks. When two motor vehicles approach from opposite directions in the same track both operators shall reduce speed and the operator with the water to his left shall yield right-of-way by turning out of the track to the right.

(ii) No motor vehicles shall be operated on any portion of a dune except at posted dune crossings.

(iii) Except as otherwise provided in this section, no person shall operate a motor vehicle on seashore lands at a speed that is greater than that established by the applicable sections of the existing Islip and Brookhaven town ordinances. Upon approaching or passing within 100 feet of a person or persons on the beach, or when passing through or over any authorized dune crossing, speed shall be reduced to 5 miles per hour.

(iv) The Superintendent may designate routes of travel across seashore lands by the posting of appropriate signs. Where routes are so designated, motor vehicles shall be operated only within the designated routes.

(v) In an emergency, the Superintendent may suspend, for such period or periods as he shall deem advisable, any or all of the foregoing restrictions on motor vehicle travel, and he may announce such suspension by whatever means are available. In the event of high winds and waves, storms, or other adverse weather conditions, the Superintendent may close all or any portion of the seashore lands to motor vehicle travel for such period as he shall deem advisable in the interests of public safety.

(5) *Violations.* Violations of any of the foregoing regulations shall be punishable as provided by law. The Superintendent may, furthermore, suspend or revoke any permit for violation of any of the foregoing regulations. Failure to operate a motor vehicle in conformance with the terms of a permit shall be deemed a violation of the regulations in this part.

[33 F.R. 8543, June 11, 1968, as amended at 33 F.R. 9074, June 20, 1968; 33 F.R. 16641, Nov. 15, 1968; 36 F.R. 55, Jan. 5, 1971]

APPENDIX 2

FIRE ISLAND FERRIES, INC., MAPLE AVENUE, BAY SHORE

Phone: (516) 665-5045

FALL KISMET 1973

SEPTEMBER 5th THRU OCTOBER 14th

Lvs. Bay Shore		*Lvs. Kismet*
MONDAY THRU FRIDAY		
Use Sunday Schedule Oct. 8th		
Mon. Only	Last Trip Sept. 17 →	7:15 am
7:40 am	← Last Trip Sept. 14 →	8:05 am
10:10 am	← Last Trip Sept. 28	
12:50 pm	← Last Trip Sept. 21 →	11:10 am
	Last Trip Sept. 14 →	2:10 pm
3:00 pm	Daily thru Sept. 14 Then Fri. Only	
	Last Trip Sept. 28 →	4:15 pm
5:25 pm	← Friday Only	
6:15 pm	Monday thru Thursday Last Trip Sept. 13	
FRIDAY ONLY		
6:40 pm		
7:50 pm	← Last Trip Oct. 5	
9:00 pm	← Last Trip Sept. 14	

Lvs. Bay Shore		*Lvs. Kismet*
SATURDAY		
9:30 am	← Last Trip Sept. 22 →	9:55 am
10:40 am		11:05 am
11:40 am	← Last Trip Sept. 22 →	12:05 pm
1:00 pm		1:25 pm
2:40 pm	← Last Trip Sept. 29	
		4:15 pm
5:00 pm	← Last Trip Sept. 22 →	5:25 pm
SUNDAY & OCT. 8th		
10:00 am		10:25 am
11:30 am		11:55 am
12:50 pm		1:30 pm
		3:15 pm
		4:25 pm
		5:35 pm
3:35 pm	← Last Trip Sept. 30 →	6:40 pm
4:45 pm	← Last Trip Sept. 23 →	7:50 pm

OCTOBER 15th THRU OCTOBER 28th

SATURDAY		SUNDAY	
10:30 am	10:55 am	10:00 am	
12:50 pm	1:15 pm	12:50 pm	10:25 pm
2:40 pm	4:15 pm		3:10 pm
			4:25 pm

SUBJECT TO CHANGE WITHOUT NOTICE

NO FREIGHT CARRIED ON PASSENGER BOATS

NO SMOKING ON BOATS

Passengers may carry 2 items of hand baggage (Total 25 lbs.) per fare.

All other items subject to freight regulations and will be shipped on regular freight boat.

Freight Boat leaves Bay Shore
10:00 a.m. Monday thru Friday
Saturday thru September 29

APPENDIX 3

United States Department of the Interior

NATIONAL PARK SERVICE
FIRE ISLAND NATIONAL SEASHORE
65 OAK STREET
PATCHOGUE, NEW YORK 11772

IN REPLY REFER TO:

A9041

June 24, 1974

INTERVENOR
C

Mr. Gabirel Grenci
P. O. Box 52
Bethpage, NY 11714

Dear Mr. Grenci:

At tne request of Mr. Crane, West Unit Manager of Fire Island National Seashore, I reviewed your application for a National Seashore Permit to operate a vehicle on Fire Island from May 28 to September 14. I see no reason to alter our previous stand on your permit.

Your needs to travel to the mainland can be reasonably met by ferry service. If for some reason, you missed the last ferry to return to the island you have an alternate domicile on the mainland where you may spend tne night. Although this may be of some inconvenience, we do not feel this is unreasonable. Most of the part time residents of Fire Island who number in the thousands find ferry service adequate for their needs. To grant permits to all of us could result in a tremendously adverse impact upon the natural resources of the Fire Island and create an extreme hazard to the health and safety of the visitors to the island. It would destroy the very reason that most people are attracted to the island - its isolation from the noise of and the harrassment by heavy traffic.

Your present permit allows you to drive on the beach after mid-September and before mid-May, when the ferry schedules are inadequate.

This decision follows the policy of previous years and is consistent with the requirements set forth in legislation (PL 88-587) and regulation, (36-CFR-7.20) for the Superintendent of Fire Island National Seashore or his authorizeo representative.

> "To protect the seashore lands and interests therein, to protect the health and safety of members of the public using the seashore, and to provide for the recreational use of motor vehicles for activities such as sports fishing and hunting in areas and at times which do not conflict with the conservation of the natural resources of the seashore. On this basis, the Superintendent

JOHNNY HORIZON 76

Let's Clean Up America For Our 200th Birthday

may approve the application, deny the application or grant the application with appropriate limitations and restrictions."

Thank you for your interest in Fire Island National Seashore. If we may be of further service please contact us.

Sincerely yours,

Patrick D. Crosland by JM

Patrick D. Crosland
Acting Chief of Operations

United States Department of the Interior

NATIONAL PARK SERVICE
FIRE ISLAND NATIONAL SEASHORE
65 OAK STREET
PATCHOGUE, NEW YORK 11772

IN REPLY REFER TO:
A9041

June 28, 1974

Mrs. Barbara Busch
P. O. Box M-95
Bay Shore, NY 11706

Dear Mrs. Busch:

Your application for a Fire Island National Seashore Oversand Vehicle Permit has been reviewed, and is denied.

Denial of your application is based on the fact that alternate travel via ferry provides ingress and egress to your beach property during this time of the year. While ferry travel may pose some inconvenience, it is an alternate which is available to you.

Sincerely yours,

Clark D. Crane

Clark D. Crane
West Unit Manager

INTERVENOR CL
F

JOHNNY HORIZON 76

APPENDIX 3-3

Let's Clean Up America For Our 200th Birthday

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
ss.:
COUNTY OF NASSAU)

VIRGINIA LEGGIO, being duly sworn, deposes and says, that I am not a party to the action, am over 18 years of age and reside in Franklin Square, New York; that on the 13th day of September, 1974 I served the within Brief of Appellee-Cross-Appellant Constitutional Rights Committee of Kismet upon the following attorneys:

Donald Cohn, Esq.

Attorney for Plaintiffs
One Rockfeller Plaza
New York, New York 10026

United States Attorney for
Eastern District of New York
Attention: Harold Friedman, Esq.
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Francis G. Caldeira, Esq.
Islip Town Attorney
Attorney for Islip Defendants
655 Main Street
Islip, New York 11751

Edward McGowan, Esq.
Attorney for Saltaire Defendants
670 Broadway
Massapequa, New York 11758

J. Stewart McLaughlin, Esq.
Village Attorney
Attorney for Ocean Beach Defendants
383 East Main Street
Bay Shore, New York 11706

C. Francis Giaccone, Esq.
Attorney for Brookhaven Defendants
518 Hawkins Avenue
Lake Ronkonkoma, New York 11779

by depositing a true copy of same enclosed in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States post-office department within New York State.

Virginia Leggio

VIRGINIA LEGGIO

Sworn to before me this
13th day of September, 1974.

Lois T. Frey

LOIS T. FREY
NOTARY PUBLIC, STATE OF NEW YORK
No. 30-[illegible]5810
Qualified in Nassau County
Commission Expires March 30, 19[illegible]

ENGLISH, CIANCIULLI, REISMAN & PEIREZ
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DAVID H. PEIREZ
DANIEL PALMIERI

CHARLES M. BERGER
M. KATHRYN MENG
ROBERT M. CALICA
MARIE LOUISE S. NICKERSON

SUFFOLK COUNTY OFFICE
AIRPORT INTERNATIONAL PLAZA
40 ORVILLE DRIVE
BOHEMIA, N.Y. 11716
516-567-5200

EDWARD P. BRACKEN, JR.
COUNSEL

September 13, 1974

Clerk
United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: George Biderman, et al. v.
Rogers C.B. Morton, Secretary
of the Interior, et al.
Docket Number 74-2016

Dear Sir:

We file herewith, four copies of the brief of intervenor-appellee-cross-appellant in the above referenced matter, with proof of service thereof.

Kindly acknowledge receipt of the within by completing and returning the postcard enclosed for that purpose.

Very truly yours,

ENGLISH, CIANCIULLI, REISMAN & PEIREZ

By: Robert M. Calica
Robert M. Calica

RMC:fc
Enc.